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IN THE

Supreme Court of the United States

OCTOBER, 1931 TERM.

No. 14

MORRIS SCHOENTHAL and FANNIE R. SCHOENTHAL,

Petitioners,

—against—

IRVING TRUST CO., as Trustee in Bankruptcy of LEONARD H. SMITH, trading as Faultless Sweater Mills, bankrupt,

Respondent.

RESPONDENT'S BRIEF.

SAUL J. LANCE,
Attorney for Respondent,
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IN THE

Supreme Court of the United States

OCTOBER, 1931 TERM.

No. 767.

MORRIS SCHOENTHAL and FANNIE R. SCHOENTHAL,
Petitioners,

—against—

IRVING TRUST CO., as Trustee in Bankruptcy of LEONARD H. SMITH, trading as Faultless Sweater Mills, bankrupt,
Respondent.

RESPONDENT'S BRIEF.

Statement.

The points in issue involved in this application are twofold:

1. Upon the facts of this case, were the defendants wrongfully deprived of a jury trial?

2. Upon those facts did the reception in evidence of the bankrupt's schedules in bankruptcy constitute reversible error?

It is submitted that upon the facts hereinafter discussed no necessity appears for review by this Court. We shall, therefore, make no extended discussion on the

general propositions developed at length by petitioners as to (1) a defendant's right to a jury trial, and (2) the general admissibility of a bankrupt's schedules in bankruptcy, but instead confine our argument to the position of petitioners on the facts at bar.

Petitioners, relatives of the bankrupt, Leonard H. Smith, are declared by the judgment under appeal to have obtained voidable preferences under §60B of the National Bankruptcy Act (11 U. S. C. A., Sec. 96) in the aggregate amount of $1,500 (fols. 80, 268-9).

Pursuant to recent amendment to the Equity Rules of this Court, the Trial Judge made separate findings of fact and conclusions of law on all of the issues in the case (See fols. 253-264).

The disposition below was affirmed by the Circuit Court without opinion (54 F. (2d) 1079) by Manton, L. Hand, and Chase, *JJ.*

Bearing on the introduction in evidence of the schedules in bankruptcy, the opinion of the Trial Judge indicates that the insolvency of the bankrupt was abundantly established (quoting only the relevant portions, fols. 222-225):

> "Briefly, the testimony discloses all the parties are related, that is to say, Morris Schoenthal and Fannie Schoenthal, brother and sister, are cousins of the bankrupt.
>
> The bankrupt testified that in June, 1930, he did not know how he stood financially, but early in that month hired a public accountant to investigate his business, paying him $100 for so doing. What his report discloses is not in evidence, but very shortly thereafter he offered his creditors twenty-five cents on the dollar * * *.

Coming down to June, 1930, the month previous to the filing of the involuntary petition the bankrupt testified he went to defendants for more funds. He was refused and was met with a demand for payment of moneys already due.

Beginning June 9, 1930, a short time after he had been informed by the public accountant of the state of his business, he began making the payments to the Schoenthals, which the Trustee here seeks to recover. During that month and previous to the filing of the petition, he paid his relatives in all $2,300, most of it to the defendants Morris and Fannie Schoenthal. During this particular month all his sales were, with few exceptions, for cash or C. O. D.; he further states he had no cash resources and that he knew he was insolvent."

During the course of trial and at various stages thereof the petitioners in order to procure an adjournment made various motions, the denial of one of which is here assigned as error, and discussed at length in petitioners' brief (pp. 9-27). The sincerity of these applications was commented upon as follows by the Trial Court (fol. 64):

"I cannot help be impressed, but there is a very studied effort being made here to postpone the case."

POINT I.

The schedules in bankruptcy were properly received in evidence since the bankrupt took the witness stand, and if improperly received, merely constituted cumulative proof on the question of insolvency upon which petitioners offered no contradictory evidence.

Petitioners assert that the admission in evidence of the schedules constituted reversible error. The bankrupt was examined as a witness and testified that the schedules were correct (fol. 120):

> "Q100. In June, 1930, what were your liabilities? A. This I couldn't tell you. You have a record there.
>
> Q101. You signed and swore to the schedules in bankruptcy in this case, did you not? A. Yes.
>
> Q102. Are your schedules correct? A. Positively.
>
> Q103. I call your attention to the fact that your schedules list liabilities totaling $18,900.26? A. That is correct."

The petitioners were not deprived of the opportunity of cross examination. Furthermore the trustee had available in court the bankrupt's books of account (fols. 155, 156). The petitioners were at liberty to employ these books if it was their contention that they establish that the bankrupt suddenly became insolvent.

The involuntary petition in this case was filed July 10th, 1930 (fol. 75). All of the transfers in suit were made within a month prior to the petition. The bankrupt testified that when the end came, he had a bank balance of $250.11 (fols. 33, 125) available for liabilities of $18,900.26 (fol. 232).

There remained however fixed assets of the scheduled value of $15,953.88 which *included* the following: an unliquidated claim of $1,026.73 (fol. 233) representing a salesman's overdrawals, and regarded as uncollectible (fols. 124, 125); a merchandise inventory of $3,624.88 (fol. 232) which had depreciated (fol. 96); and a fixed item of machinery and fixtures stated at $9,282.15, half of which was "three or four years old" and had depreciated in value (fol. 123). From the above it was contended that the scheduled value was at least more than 50% of the actual value.

As against liabilities of $18,900.26, the trustee's balance available for creditors realized from all sources is $5,097.10 (fols. 76, 77, 231).

The bankrupt testified that in the month of June business was dull, that he had very little cash on hand, and had a number of past due bills (fols. 108, 109).

In view of the foregoing, it is clear that no extraordinary improvement or substantial change was taking place in the bankrupt's financial affairs during the month of June to rebut the presumption that the bankrupt admittedly insolvent on the petition date was in the same condition the month preceding.

Wilmot Engineering Co. v. *Blanchard*, 203 N. Y. Supp. 700, 703 (App. Div., 4th Dept., 1924), quoting from the opinion of present Court of Appeals Judge Henry T. Kellogg:

> "It does not appear that its insolvency came about through some untoward happening within the 19 days. *Therefore, if it was insolvent on the 3d day of December, 1921, it was presumptively insolvent on the 14th day of November, 1921.*" (Italics ours.)

To the same effect see *In re Dix,* 267 Fed. 1016 (D. C. N. Y.), decided by Learned Hand, *C. J.,* while sitting in the Northern District holding that where insolvency is undisputed at the time of bankruptcy, it is *prima facie* proof of insolvency a month prior thereto.

Petitioners cite numerous authorities relative to the admissibility of schedules, in some of which the bankrupt did not take the witness stand. *Grant* v. *National Bank of Auburn,* 197 Fed. 581 (see Brief, p. 28) arose on a demurrer to the complaint before trial and is, therefore, distinguishable since the bankrupt was a witness in this case.

The trial court found that insolvency was clearly established (fol. 226):

> "Insolvency has been shown. The fact that shortly after the payments were made the bankrupt offered 25 per cent. to his creditors is sufficient on that question. It is an admission that his assets equaled 25 per cent. of his liabilities."

The Trustee need not in every case burden the estate with the expense of engaging an accountant to interpret the books and records particularly where the insolvency alleged is so close to the petition. Moreover, as has been recognized, schedules are competent proof on the question of financial condition.

> "Upon this question (insolvency) it is proper to consider the condition of the bankrupt's estate as disclosed by the schedules in bankruptcy."
>
> *Lyttle* v. *Fifth National Bank,* 39 A. B. R. 690, 693, affirmed by the circuit court, 250 Fed. 361, Rogers, *C. J.* (*certiorari* denied, 247 U. S. 506).

Collier on Bankruptcy, 13th Edition, 1923, Volume 1, page 26:

> "The books of a bankrupt, his schedules, inventory, and appraisement are competent evidence upon the question of insolvency."

Upon principle it is submitted that filed schedules in bankruptcy should be received as some evidence on the issue. The court is mindful of the penalties which a bankrupt must suffer if the schedules are false, namely, that a false oath thereto will deprive the bankrupt of his discharge privilege (National Bankruptcy Act, §14b (1), 11 U. S. C. A., Sec. 32) and will also make him punishable by imprisonment (National Bankruptcy Act, §29b (2), 11 U. S. C. A., Sec. 52).

However, upon the facts of this case petitioners cannot complain because the bankrupt testified as to their accuracy and an opportunity was afforded the defendant to cross-examine and develop that the schedules were false and inaccurate, and also had access to the books of account to indicate a contrary state of facts.

POINT II.

Assuming *arguendo* that petitioners were entitled to a trial by jury, such privilege may be and was upon the facts of this case effectively waived.

At the outset we deem it necessary to make mention of an error which appears in petitioners' brief at page 26 with respect to the facts of *Allen* v. *Gray,* 201 N. Y. 504. The petitioners cite this case for the following proposition, quoting from their brief (p. 26):

> "At the opening of the trial, *defendant* de-

manded a jury trial which was denied. The Court of Appeals reversed a judgment for the trustee *on the ground that defendant was entitled to a jury trial.*" (Italics ours.)

Reference to the case discloses that the demand for a jury trial was made by the *plaintiff* and not by defendant as is stated by petitioners.

We quote from *Allen* v. *Gray,* 201 N. Y. 504, at page 505:

> "The case was noticed for trial upon the calendar for jury trials, but upon the defendants' motion was transferred to the Special Term calendar. It was thereafter brought on for trial before the court without a jury. At the opening of the trial *the plaintiff demanded a jury trial,* which was refused, and an exception was taken to the refusal." (Italics ours.)

In the case at bar with laudable ingenuity but questionable good faith *at the opening of the trial* and at frequent intervals during its progress the petitioners made the following formal motions all of which were denied:

1. For an adjournment because of the alleged illness of petitioner, Fannie R. Schoenthal (fols. 57-68, 71, 2; 213).

2. For a jury trial (fols. 68-69, 193).

3. For a severance of the actions because of alleged misjoinder of parties (fols. 69-71).

The denial of the second of these motions is assigned as ground for review by this Court and discussed by petitioners in 18 pages of their brief (pp. 9-27).

Issue was joined in the action at bar, in October, 1930 (fol. 27) and under the rules of the District Court was granted a preference because the plaintiff is a trustee in bankruptcy (fols. 67, 72). The action appeared on the call calendar in February thereafter and was marked ready, and although the defendant's illness allegedly "has existed for nearly a year and still exists at the present time", no notice was given plaintiff, or any attempt made to take a deposition (fols. 64, 72, 219), nor any claim made in defendants' answer for a jury trial:

> "The Court: * * * counsel has not shown proper diligence in getting the woman's testimony or her deposition. *I cannot help be impressed but there is a very studied effort being made here to postpone the case*" (fol. 64). * * *
>
> "That is the impression I have gained from having heard two or three motions, at various times, since I have been sitting in this court, all of them with the idea of postponing the final hearing on this action" (fol. 67).

The above comment is equally applicable to the next motion which involved a demand for a jury trial. Assuming this application had merit, made returnable when the plaintiff was in court with witnesses prepared for trial, and no objection being raised in defendants' answer (fols. 26, 29), the motion was properly denied on the following authorities on the ground that the defendants by their acts had waived their right, if any existed, to object.

> *Adams* v. *Clarke* (C. C. A. 9th) 22 F. (2d) 957, at page 958:
>
> "But however that may be, defendants did not present to the lower court their request for a

transfer to the law side *until after the cause was actually called for trial* upon the equity calendar, and we think they thus waived such right, if any, as they may have had."

For an extended review of the authorities on the above proposition, see *Rosenthal* v. *Heller* (D. C. M. D., Penn.) 266 Fed. 563, relying upon decisions of this Court below noted:

> "To accomplish what plaintiff is here attempting could no doubt be accomplished by an action at law, and where such remedy is afforded a suit in equity will not be sustained, *unless waived by the parties.* The provisions of Section 723 of the Revised Statutes of the United States (Comp. St. §1244), that suits in equity shall not be sustained in the courts of the United States where there is an adequate remedy at law, was enacted to secure a privilege to a defendant *which he may waive* (*Warmath* v. *O'Daniel,* 159 Fed. 87, 20 Am. Bankr. Rep. 101), either by actual consent (*Hicks* v. *Knost,* 178 U. S. 541, 20 Sup. Ct. 1006, 44 L. Ed. 1183), *or by acquiescence.* See *Hollins* v. *Brierfield Coal & Coke Co.,* 150 U. S. 371, 380, 381, 14 Sup. Ct. 127, 37 L. Ed. 1113; and *Brown* v. *Lake Superior Iron Co.,* 134 U. S. 530, 536, 10 Sup. Ct. 604, 606 (33 L. Ed. 1021) where it was said by Justice Brewer:
>
> "* * * If the objection of want of jurisdiction in equity is not taken in proper time, namely, before the defendant enters into his defense at large, the court having the general jurisdiction will exercise it; and in a note (in 1 Dan. Ch. Prac. [4th Am. Ed.] p. 550) many cases are cited to establish that *"if a defend-*

> *ant in a suit in equity answers* and submits to the jurisdiction of the court, *it is too late for him to object* that the plaintiff had a plain and adequate remedy at law. This objection should be taken at the earliest opportunity.'"
>
> The defendants having entered their defense upon the merits at large, *they have waived their right to a trial at law,* and their motion to dismiss will be denied."

For a more recent holding that the objection may be waived, see *Duignan* v. *U. S.,* 274 U. S. 195, and *Henrietta Mills* v. *Rutherford County* (1929), 281 U. S. 121, 128, relying on *Singer Sewing Mach. Co.* v. *Benedict,* 229 U. S. 481, and *Reynes* v. *Dumont,* 130 U. S. 354, 395.

Preference actions have been tried in equity in the Second Circuit for 25 years on the authority of *Parker* v. *Black,* 151 Fed. 18 and *Parker* v. *Sherman,* 212 Fed. 917, Lacombe, *J.*

This Court has thus far refused to pass on the question. See *Adams* v. *Jones,* 11 F. (2d) 759, certiorari denied 271 U. S. 685 (1926). Certainly on the facts at bar no reason appears at this time for an examination into the question.

The existing rule moreover should not be disturbed, since the trial of preference actions by juries would needlessly delay and add to the cost of bankruptcy administration, by prolonging trials, and would unnecessarily encumber the already heavily burdened civil jury trial calendars.

Not long after the enactment of the Bankruptcy Act of 1898, Holt, *J.,* regarded as the "Father of the Bank-

ruptcy Act", sitting in the Southern District of New York, made the following holding in 1903, relating to the precise issue at bar:

Pond v. *New York National Exchange Bank,* 124 Fed. 992 (S. D. N. Y.), at page 992:

"This is a demurrer to a bill in equity filed to recover $16,000, paid by the bankrupt to the defendant, on the ground that it constituted a preference, prohibited by the bankruptcy act. * * * The only * * * grounds which require any consideration * * * are that the complainant has an adequate remedy at law. * * *"

At page 993:

"Under this section it is well settled that it is not enough that there is a remedy at law, it must be plain, adequate and complete; that is, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity. *Boyce* v. *Grundy,* 3 Pet. 213, 7 L. Ed. 655; *Thompson* v. *Allen Co.,* 115 U. S. 550, 6 Sup. Ct. 140, 29 L. Ed. 472.

This suit is analogous to a judgment creditor's suit to set aside a fraudulent conveyance. The original payment, when made, was valid. It would not have been voidable by the bankrupt. It has only become voidable at the election of the trustee in bankruptcy, in the same manner as a fraudulent conveyance may be set aside by a judgment creditor. The jurisdiction in such cases has always been in equity. Many such suits in equity were brought by trustees in bankruptcy under the act of 1867; for instance, *Grant* v. *Natl. Bank,* 97 U. S. 80, 24 L. Ed. 971; *Rogers* v. *Palmer,* 102 U. S. 263,

26 L. Ed. 164; *Stucky* v. *Masonic Savings Bank*, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640. Under the present act, it has been held that a suit in equity is the proper remedy. *Wall* v. *Cox*, 101 Fed. 403, 41 C. C. A. 408. This was one of the cases which held that the district court had jurisdiction of such suits under the original act, before the decision of the United States Supreme Court in *Bardes* v. *Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, which established the contrary rule; but the portion of the opinion which relates to the question whether such a suit shall be brought in equity or at law is entirely applicable to cases arising under the amended act.

My conclusion is that the demurrer should be overruled, with leave to the defendant to answer upon payment of costs."

POINT III.

Equity jurisdiction was properly invoked in this case in order to prevent multiplicity of suits.

This suit was commenced on preference causes of action identical except for amounts and dates of transfer against three separate defendants as follows:

Fannie R. Schoenthal (fol. 19)	$1,000
Morris Schoenthal (fol. 15)	500
Hyman Smith (fol. 21)	800

Only the first two were served. They appeared and filed separate answers, making no claim at the time of a misjoinder of parties or that the bill was not cognizable in equity (fols. 26, 29).

The petitioners in this Court claim no error on account of misjoinder of parties, and thereby concede that

these parties were all properly joined in this suit. By answering to the merits without protest, the defendants cannot in any event be heard to claim a misjoinder. (See *Barney* v. *Latham,* 103 U. S. 205, 215).

It is obvious that the actions involved common issues of law and fact, both from the record and petitioners' brief, and that, therefore, the defendants were properly joined in the action to prevent multiplicity of suits and to promote the convenience of witnesses pursuant to Rule 26 of the Equity Rules of this Court. (See *Marcus Brown Holding Co.* v. *Feldman,* 269 Fed. 306, 309, and *Jones* v. *Slauson,* 33 Fed. 632, 633.)

It appears, therefore, that the plaintiff's remedy at law was not "plain, adequate and complete" as contended. By virtue of the joinder of parties on causes of action which involved relatively small amounts, all of these issues were thereby disposed of in one trial.

A community of interest in the questions of law and fact involved in this controversy is sufficient to justify the exercise of equity jurisdiction to prevent a multiplicity of suits.

Commodores Point Terminal Co. v. *Hudnal* (D. C. Fla. 1922), 283 Fed. 150.

To the same effect see

Macmillan v. *Anderson* (D. C. Iowa, 1922), 282 Fed. 675.

This Court has held that equity jurisdiction will be sustained when a multiplicity of suits will be saved.

Oelreichs v. *Spain* (Dist. Col. 1872), 15 Wall. 211, and

Reynes v. *Dumont,* 130 U. S. 354.

CONCLUSION.

It is respectfully submitted that the petitioners have shown no reason in law or in fact which would justify this Court in granting their petition for certiorari in this case, and therefore, the petition should be dismissed.

Dated, March 25th, 1932.

Respectfully submitted,

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